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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1948

No. 314

UNITED STATES OF AMERICA,
Petitioner,

vs.

CAL-BAY CORPORATION, MARIA FARIA, JOSEPH FARIA, JR., EDWARD FARIA, and MAE E. ROCHE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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OPINIONS BELOW.

No opinion was written in the district court. The opinion of the court of appeals is not yet reported, but appears in the record. R 1294-1315.

JURISDICTION.

The judgment of the court of appeals was entered June 29, 1948. R 1316. No petition for rehearing was filed. Jurisdiction of this court is invoked under the Act of June 25, 1948. 28 U.S.C., sec. 1254 (1).

QUESTIONS PRESENTED.

1. Whether the decision of the court of appeals should be reviewed before the case has been finally determined below.

2. Whether the trial judge misdirected the jury to the prejudice of defendants and respondents on the measure of compensation.

3. Whether defendants and respondents were denied a fair trial and due process of law by the acts and conduct of the trial judge.

STATEMENT.

The action was in condemnation and defendants and respondents therefore had the burden of proving market value of the property taken, namely, lessors' and lessees' mineral rights in land under leases for oil and gas development and upon which they claimed to have discovered petroleum gas of commercial quantities. Their holdings, designated as parcels 57, 58, 59, and 64, were part of a tract of 5,430 acres condemned by petitioner in 1944 to expand an ammunition dump or

United States Naval Magazine. R 2-11. Their holdings were in the second largest metropolitan area in California—an area in which large quantities of natural gas were consumed—an area to which natural gas was being brought from a distance of from 200 to 300 miles. R 1294-1295.

The immediate area in which the parcels were located was oil and gas bearing, and running over the years owners of lands therein, as lessors, had entered into oil and gas leases. These had gradually centered in respondents Cal-Bay Corporation and Joseph Faria, Jr. Their chains of title were undisputed at the trial and established without objection. R 218-232. The leases were uniform and are typified by defendants' exhibit 2. R 1217-1229. Each was for the term of 20 years and so long thereafter as oil or gas in paying quantities was produced. R 1218. Each was on a royalty basis of 12½% to the lessor. R 1218-1219. Each required the lessee to commence drilling operations within a year and to diligently prosecute drilling to a depth of 5000 feet. R 1220. Each required the lessee to drill a new well if a dry hole had resulted from previous drillings. R 1221. Each required the eventual drilling of a well on each 20 acres leased. R 1222. Each lease provided that it was one of a series of leases in a general district and that commencement of drilling within a year under one lease should be deemed drilling under all. R 1229.

Respondent Cal-Bay Corporation was incorporated in California on April 17, 1942. R 230-231, 310. It

was incorporated for the purpose of acquiring the oil and gas leases assembled by respondent Joseph Faria, Jr. in the area involved and developing the leased property. R 230-231. Under permits from the Division of Corporations of the State of California *approving a valuation of $366 per acre* (R 1298) its shares were sold to the public at $1 a share and over $250,000 was thus invested in the company by its 632 shareholders. R 232-233, 252, 326, 367-368. *All* the money thus raised and invested went into the development of the property and the drilling of the well known as Faria No. 1 on parcel 59. R 367-368. No salary or other compensation was received by any officer of the corporation. R 368.

Drilling of the well was commenced in July, 1943, discontinued in November, 1943, and resumed in June, 1944. R 253-254. At a depth of 3000 feet gas showings were found. R 239. At a depth of 4268 feet the volume of gas amounted to 100,000 cubic feet a day, and this increased to 125,000 cubic feet a day as greater depths were reached. R 250.

Location of the well was made on the recommendation of Byron Norris, a consulting geologist and petroleum engineer, and developments were supervised by him. R 621. He had been an inspector in the Division of Oil and Gas of the State of California. R 632. His first inspection of the Cal-Bay properties in March, 1942, was followed by careful examination and tests. R 626-632. He found pronounced surface indications of oil and gas. R 626-632. He found pro-

nounced favorable formations. R 632-644. He recommended the drilling of the well known as Faria No. 1 at the point where it was drilled and was of the opinion that oil or gas would there be encountered at a depth of 5000 feet. R 658, 662.

Drilling of the well was actively in progress when the condemnation action was commenced on July 25, 1944, and the respondent Cal-Bay Corporation was served with notice that petitioner required immediate possession of the lands subject to the action. R 255. All work was stopped. R 256. Conferences with representatives of the Navy resulted in the resumption of drilling operations in August, 1944. With the approval of the district court a stipulation was entered into on September 28, 1944, between the petitioner and respondent Cal-Bay Corporation, whereby the latter was permitted to remain in possession of parcels 58 and 59 and prosecute drilling and other operations thereon "until one month after service by the plaintiff on said defendant, or on its attorneys herein, of written notice of the termination of said right to possession." R 258-260, 279-280. Such notice of termination of right to possession was served upon respondent Cal-Bay Corporation on December 15, 1944, and possession was surrendered pursuant thereto on January 15, 1945. R 280-281.

When drilling had been resumed in August, 1944, with the consent of the Navy representatives, gas showings were encountered at 4760 feet and steadily increased. R 261-263, 266. On November 28, 1944, so

great a volume of gas was encountered at a depth of 4975 feet that it "blew out" the contents of the well and temporarily disabled the well. R 269-275. In the opinion of Byron Norris, a commercial discovery of natural gas had been made. R 682-683. Two weeks later, petitioner notified respondents to vacate the property.

No question of title was involved at the trial. R 218. The sole question was the amount of just compensation to be paid defendants and respondents. Expert testimony by valuation experts as to market value was therefore necessary. For defendants and respondents, expert testimony on the subject was given by John H. Wents, Jr., a consulting petroleum engineer and geologist, and by William G. Bradford, a dealer in oil and gas leases. R 860-866. Uncertainties and speculation necessarily entered into their valuations from the very nature of the case, and properly so. *Montana Ry. Co. v. Warren,* 137 U. S. 330; *Eagle Lake Improvement Co. v. United States,* 5 Cir., 141 F. 2d 562. The trial judge did not agree with the law of these cases. He regarded such valuations as no valuations at all. On a matter subject of expert knowledge he undertook to discredit the experts. He examined witness Wents at length by repeated interrogation showing that uncertainties and speculation entered into the valuations given by the witness. R 854-857. He interrogated witness Bradford as follows (R 905-908):

"The Court: I just wanted to ask a question about this royalty.

Q. You valued the 12½ per cent interest of Maria Faria in this lease, you told me the other

day, at $41,600. That is about at the rate of $3,500 a per cent, isn't it?

The Witness: Your Honor, I figured it at $200 an acre to buy the entire 12½ per cent, if she was going to sell her entire interest.

The Court: If she had a 12½ per cent interest you were going to buy it for $41,600, that would be at the rate of about $3,500 a per cent.

A. That is right.

The Court: Where has anybody in California ever paid at $3,500 a per cent for a landlord's interest in a gas lease where the land was not proven?

A. Your Honor, I just sold one—

The Court: Can you answer that?

A. Yes, I have bought it and sold it for that.

The Court. Where was this?

A. I sold one, a wildcat drilling, sold it to the Seaboard Oil, a matter of record here, in the last three months, $3,500 for one per cent in three and a half acres.

The Court: Unproven land?

A. It was unproven, your Honor.

The Court: Will you tell me who made that lease, the parties to it, and when it was done?

A. Yes, sir, I will. The Petroleum Corporation and the Producers Oil are the owners. They are San Francisco people here.

The Court: Are you telling me that the Seaboard Oil Company pay you $3,500 a per cent for a lessor's royalty in an unproved piece of land?

A. Your Honor, Mr. Scampini—

The Court: Just answer that question.

A. Yes, sir, they paid more than that.

The Court: The Seaboard Oil Company for a lessor's interest paid $3,500 a per cent for an unproved piece of land?

A. Yes, sir, they did.

The Court: I just can't believe you are telling the truth on that.

Mr. Scampini: Your Honor, I will cite your Honor to the corporation permit on the subject before the Corporation Department. I will give your Honor the number of the transaction.

The Court: I asked a very definite question of the witness and he has answered it. We will leave it go at that.

The Witness: I certainly did.

Mr. Scampini: We offer to prove at this time the records of the transaction and bring the records of the transaction and offer them in evidence. One per cent, if it please the Court, sold for over $6,400, one per cent in three and a half acres. The nearest well being drilled was a mile and a half away, and it ended up in a dry hole, your Honor, and the Seaboard (paid) the cash to the Corporation Department in November of last year.

The Court: For a lessor's—

Mr. Scampini: For a lessor's interest of one per cent.

The Court: Well, I do not know what has happened to our Corporation Department in the State of California. That is all I can say.

Mr. Scampini: If it please the Court, the Seaboard Company—

The Court: I am sorry to have made this comment. I will tell the Jury to disregard it. It is just a comment of the Court. * * *"

Witness Wents was also interrogated further by the court after Bradford had testified (R 926-927):

"The Court: * * * I just want to ask another question. I wanted to satisfy my curiosity as to

some of these matters of royalty interest I think you said that you appraised the royalty interest of Maria Faria at 12½ per cent in the 208-acre tract at $62,250.

A. I believe something like that.

Q. That is at the rate of $5000 a per cent, approximately?

A. Yes.

Q. Do you happen to know that the highest rate per cent that has ever been paid for lessors' royalty interest in the State of California is?

A. No, I don't but I know of a sale as high as $140,000 a per cent in land not proven yet. That was at Coalinga.

Q. Do you know what was the highest per cent that has ever been paid the lessor royalty interest in either the Kettleman fields or Coalinga was?

A. $140,000 in Coalinga. With respect to leasehold interest in Kettleman Hills the Amerada Petroleum Corporation purchased from the Union Oil Company one-half of a 160-acre lease for the sum of eight million dollars, four million dollars in cash and four million dollars out of oil.

Q. That was on the basis of a property already proven?

A. No, that had not been drilled at the time of the sale.

Q. It hadn't been drilled?

A. No, not that particular lease, had not been drilled at the time, according to the information I have. That was the Amerada King lease.

The Court: I have no further questions."

Later, in chambers, the trial judge said (R 1138-1140):

"* * * I feel duty bound in this case, from what I have heard, to tell this jury that in the opinion of the court the view of the so-called experts presented by the defendants is entitled to no weight whatsoever, and that the opinions that they have given are fantastic and are at a borderline, at a point where a more serious criticism could be made of them." * * *

Mr. Scampini. All I can say in reply to your Honor's observations is, with all due respect to your Honor, and to the Court, that it appears to me that the record shows that throughout the trial of this case your Honor has had a somewhat partisan outlook on the litigation before you.

The Court: Not until I had heard the opinion testimony offered by the defendants."

In the jury charge, the trial judge refused (R 94-95, 97) to instruct the jury on the law declared in *Montana Ry. Co. v. Warren,* 137 U. S. 330, and *Eagle Lake Improvement Co. v. United States,* 5 Cir., 141 F. 2d 562, and instructed the jury to the contrary. R 1296-1297. He told the jury that "in the opinion of the court the values fixed by the expert witnesses produced by the defendants in this case appear to the court to be so exaggerated as to make the testimony of these witnesses incredible", for the reason "that it appears to the court that there is no factual basis presented in the testimony of the expert witnesses for the defense upon which the opinion of value given by them can be said to rest". R 1188-1189. He refused to caution the jury against testimony minimizing or diminishing value although he commented on defendants'

valuation testimony as magnifying or exaggerating value. R 96-97.

In his concluding words to the jury, the trial judge said (R 1196):

> "In that connection, I call your attention to the fact that there is a staggering divergence of opinion between the values testified to by those who have testified on behalf of the defendants and those who have testified on behalf of the Government. The total figures of the defendants' claim is $786,000. The total figures of values asserted by the Government is $3,865."

If the tabulation in the appendix to the petition be figured out it will be found that the figure $786,000 represents the total damage claims stated in the defendants' pleadings and not the total of the values testified to by their witnesses. And if the lowest valuations given by these witnesses and appearing in the tabulation be added, it will be found that the total is roughly $624,000. From that $624,000 must be deducted the sum of $234,000 which was given as the value of the well on parcel 59. R 799. In other words, a fair statement to the jury of the total of the values to which defendants' witnesses testified would have been just about half of what the trial judge stated.

Clearly, the court of appeals reached a sound conclusion when it said, "The refusal to give the requested instruction and the court's bald statement that there is no evidence, considered with all these other occurrences at the trial, constitute prejudicial error and appellants are entitled to a new trial". R 1307.

ARGUMENT.

(1) REVIEW OF THE DECISION OF THE COURT OF APPEALS SHOULD BE DENIED AS THE CASE HAS NOT BEEN FINALLY DETERMINED BELOW.

The decision of the court of appeals granted defendants and respondents a new trial. R 1307. Petitioner, citing *Hamilton Shoe Co. v. Wolf Brothers,* 240 U.S. 251, concedes that it is "the general practice of this Court not to review a decision until the case has been finally determined below". P 21. But, *citing United States v. General Motors Corp.,* 323 U.S. 373, petitioner asks that an exception to the general practice be made on the theory that "the ruling of the court below is 'fundamental to the further conduct of the case'." P 21. The reason given is that "the district judge, upon the new trial, would be bound to restrict his comments as directed by the court of appeals, and the decision below is thus final as to that matter". P 21. The reason is unsound. The decision will not restrict the trial judge on retrial from a legitimate exercise of his power to comment on the evidence. It may not be supposed that the trial judge on retrial will again term expert witnesses prevaricators in a matter the subject of expert testimony or assume the role of a partisan or advocate. The only effect of the decision will be the salutary one of securing a fair trial to both sides.

(2) THE TRIAL JUDGE MISDIRECTED THE JURY TO THE PREJUDICE OF DEFENDANTS AND RESPONDENTS ON THE MEASURE OF COMPENSATION.

The case called for an application of the law declared in *Montana Ry. Co. v. Warren,* 137 U.S. 330, and *Eagle Lake Improvement Co. v. United States,* 5 Cir., 141 F. 2d 562. It is clear from the record that the trial judge did not agree with that law. It is also clear from the record that the jury was instructed to the contrary, despite the request of respondents for an instruction based on such law. That the court of appeals soundly concluded that the jury was misdirected, cannot be doubted.

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(3) DEFENDANTS AND RESPONDENTS WERE DENIED A FAIR TRIAL AND DUE PROCESS OF LAW BY THE ACTS AND CONDUCT OF THE TRIAL JUDGE.

The court of appeals carefully weighed the acts and conduct of the trial judge by the tests prescribed in *Quercia v. United States,* 289, U.S. 466, 469, 471-472, and found prejudicial error. Any other conclusion in a condemnation action where the Bill of Rights guarantees that private property shall not be taken for a public use without *just* compensation, would be shocking to a sense of justice.

CONCLUSION.

The judgment below is correct and the law is plain. Respondents therefore respectfully submit that the petition for a writ of certiorari should be denied.

Dated, San Francisco,
October 25, 1948.

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